

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

JIM SCHUMACHER, a married man,

Appellant,

v.

IMG GROUP, LLC, a Utah corporation,

Respondent.

No. 37721-7-II

UNPUBLISHED OPINION

Armstrong, J. — Jim Schumacher appeals the trial court’s orders dismissing his breach of contract action against IMG Group, LLC, for lack of personal jurisdiction or forum non conveniens and awarding IMG attorney fees. We find that the trial court had specific personal jurisdiction over IMG, and we reverse the award of attorney fees to IMG.

FACTS

IMG is a limited liability corporation incorporated in the State of Utah, with its principal place of business in Utah. IMG was formed to research and develop technologies for use in the building materials industry, including processes and applications for the reinforcement of plastic resins through the use of natural fibers and fillers for plastic composites.

Jim Schumacher is an engineer with expertise in extruded composite materials, which have advantages over vinyl or aluminum for common applications such as window frames, door frames, and other products. When he heard that IMG might have a job opening, he sent his resume to the company and then traveled to Utah at his own expense to interview for the position. On October 31, 2005, IMG hired Schumacher to assist with developing and securing the intellectual property necessary to manufacture certain building materials technologies. IMG also hired Larry Tinker to

assist with that development and Gary Feldscher to handle sales and marketing. Tinker and Feldscher live in California. Schumacher signed the contract at his home in Bonney Lake, Washington.

One of Schumacher's obligations under the contract was to assist IMG in establishing ongoing business relationships in the building materials industry. The contract noted that

Employee will be involved in development, re-development, and refinement of those products, methods and advisor and referral sources and customer lists. The Company's success is highly dependent on maintaining and developing referral sources and customer loyalty and satisfaction, much of which is obtained through the person-to-person interaction of those persons and Employee. Employee's services will require personal contact with customers, suppliers, referral sources and others and Employee's personality, courtesy or honesty will result in development of Company good will, which good will is essential for the continued viability and profitability of the Company.

Clerk's Papers (CP) at 8.

The contract agreed to cover Schumacher's expenses for travelling from his "present home" to Utah every week and added that when IMG required Schumacher's relocation, it would reimburse him for "reasonable moving costs from his current residence to the required Company location." CP at 6-7. The contract further provided that it was to be governed by Utah law and that a Utah district court would have jurisdiction over its enforcement and interpretation.

In June 2006, IMG registered with the Washington State Department of Revenue. Through Schumacher, IMG purchased building materials and equipment from four Washington companies. Schumacher called on four other Washington companies that produce vinyl extrusion products in an attempt to work out business arrangements on IMG's behalf. In addition, Schumacher tested developmental fiber-reinforced resins for IMG at Washington State University.

He travelled extensively outside of Washington on behalf of IMG as well.

When IMG demanded that Schumacher sign over his interests in various patents for which IMG had applied, Schumacher refused. IMG fired him on September 28, 2007, and after Tinker and Feldscher refused similar demands, the company fired them as well. IMG sued Schumacher, Tinker, and Feldscher in Utah on October 1, 2007. Apparently before being served with that complaint, Schumacher sued IMG on December 4, 2007, in Pierce County Superior Court.¹ Schumacher asked the court to find his written employment contract “unenforceable on account of defendant’s breach” and for related relief. CP at 3.

Schumacher subsequently answered IMG’s Utah complaint without contesting jurisdiction in Utah. IMG did not answer Schumacher’s Washington complaint but instead filed a motion to dismiss for lack of personal jurisdiction or on the basis of forum non conveniens. The Pierce County court granted IMG’s motion on both grounds and denied Schumacher’s motion for reconsideration. The court also awarded IMG attorney fees of \$33,876.28 under Washington’s long-arm statute, RCW 4.28.185(5).

ANALYSIS

I. Personal Jurisdiction

1. Standard of Review and Burden of Proof

We review a trial court’s dismissal order for lack of personal jurisdiction de novo. *Raymond v. Robinson*, 104 Wn. App. 627, 633, 15 P.3d 697 (2001). Where the trial court’s ruling is based on affidavits, the plaintiff bears the burden of making only a prima facie showing of

¹ The record contains no information regarding the date of service, but Schumacher contends that he filed his own action before being served with IMG’s complaint.

jurisdiction. *Raymond*, 104 Wn. App. at 633; *Precision Lab. Plastics, Inc. v. Micro Test, Inc.*, 96 Wn. App. 721, 725, 981 P.2d 454 (1999). In determining whether a plaintiff has met this burden, we resolve conflicts between the affidavits in the plaintiff's favor. *Ochoa v. J.B. Martin & Sons Farms, Inc.*, 287 F.3d 1182, 1187 (9th Cir. 2002). We take allegations in the complaint as correct for purposes of appeal. *Raymond*, 104 Wn. App. at 633.

The exercise of personal jurisdiction over a nonresident defendant must be consistent with the due process requirement of the Fourteenth Amendment. *Im Ex Trading Co. v. Raad*, 92 Wn. App. 529, 534, 963 P.2d 952 (1998). The amount and kind of activities required of the nonresident corporation in the forum state must be such that it is reasonable and just to subject the corporation to the jurisdiction of that state. *Im Ex Trading Co.*, 92 Wn. App. at 534. In Washington, a court may exercise personal jurisdiction over a nonresident defendant by asserting either general or specific jurisdiction. *Van Steenwyk v. Interamerican Mgmt. Consulting Corp.*, 834 F. Supp. 336, 339 (E.D. Wash. 1993); *Im Ex Trading Co.*, 92 Wn. App. at 534. RCW 4.28.080(10) creates general jurisdiction, while RCW 4.28.185 creates specific jurisdiction. See *Hein v. Taco Bell, Inc.*, 60 Wn. App. 325, 328, 803 P.2d 329 (1991); *MBM Fisheries, Inc. v. Bollinger Mach. Shop & Shipyard, Inc.*, 60 Wn. App. 414, 422, 804 P.2d 627 (1991).

2. General Jurisdiction

General jurisdiction over a nonresident defendant is proper when the defendant's actions in the state are so substantial and continuous that justice allows the exercise of jurisdiction even for claims not arising from the defendant's contacts within the state. *Raymond*, 104 Wn. App. at 633. RCW 4.28.080(10) authorizes general jurisdiction over a nonresident defendant if the

defendant is transacting substantial and continuous business within the state of such character as to give rise to a legal obligation. *Im Ex Trading Co.*, 92 Wn. App. at 535. In making this determination, courts look to the amount, kind, and continuity of activities carried out by the nonresident in Washington. *Bartusch v. Oregon State Bd. of Higher Educ.*, 131 Wn. App. 298, 304, 126 P.3d 840 (2006).

Schumacher asserts that during the course of his employment at IMG, he worked a substantial portion of the time in Washington because IMG never provided him with a workplace elsewhere. He purchased equipment and supplies for IMG from Washington manufacturers, called on Washington companies on IMG's behalf, and tested resins developed by IMG at Washington State University. Because of its registration with the Department of Revenue, IMG paid the State of Washington workers compensation and employment security taxes for Schumacher.

IMG complains that it was surprised to learn of its Washington business license and claims that IMG management did not authorize the registration. Schumacher states in his reply brief that he registered IMG, but the record does not disclose who was responsible. Although IMG also asserts that it has had no dealings with Washington companies and has no office in Washington, the record contains two invoices sent to IMG at Schumacher's Washington address from Washington companies. IMG also claims that because of Schumacher's noncompetition agreement with Mikron, his former employer in Washington, it understood that Schumacher could not represent IMG in Washington. Schumacher's declaration responds that he met with Mikron on IMG's behalf and that the noncompetition agreement was not an issue because IMG was

working to supply the company with material and not to compete with it.

Even if these factual disputes are resolved in Schumacher's favor, we conclude that IMG's actions did not constitute the substantial and continuing business in Washington needed to establish general personal jurisdiction over the company. In *Raymond*, the following contacts were not sufficient: placing advertisements in four national magazines that reach Washington consumers; sending informational materials or otherwise contacting 150 Washington consumers; negotiating terms with Washington residents by phone and mail; selling 10 percent of its units to Washington consumers over five years; distributing a list of past Washington consumers to potential Washington customers; authorizing warranty repairs in Washington; sending a technician to Washington to repair the plaintiff's unit; and orally extending the plaintiff's warranty while the plaintiff was in Washington. *Raymond*, 104 Wn. App. at 633-34.

The contacts that Schumacher describes are less significant than those in *Raymond*. Schumacher was the lone IMG employee in Washington. During his two-year employment, he worked only part of the time in Washington. Although he contacted some Washington companies on IMG's behalf, bought supplies from others, and did some testing for IMG at a Washington state university, and even though IMG was registered as a business in Washington, these contacts do not constitute substantial and continuous business activity within the state. See *Romann v. Geissenberger Mfg. Corp.*, 865 F. Supp. 255, 261 (E.D. Pa. 1994) (overall nature of the activity, rather than its quantitative character, determines general jurisdiction), *abrogated in part on other grounds*, *Eagle Traffic Control, Inc. v. James Julian, Inc.*, 933 F. Supp. 1251, 1256 (E.D. Pa. 1996). The trial court properly declined to exercise general personal jurisdiction over IMG.

3. Specific Jurisdiction

Schumacher argues in the alternative that specific jurisdiction exists under Washington's long-arm statute, RCW 4.28.185, because IMG transacted business within the state. The statute provides in part as follows:

- (1) Any person, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts in this section enumerated, thereby submits said person . . . to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of said acts:
- (a) The transaction of any business within this state[.]

RCW 4.28.185(1)(a) (emphasis added).

Long-arm jurisdiction standards are less stringent than those necessary to establish general jurisdiction. *Bartusch*, 131 Wn. App. at 306. To prove that specific jurisdiction exists, Schumacher must establish three factors: (1) IMG must have purposefully done some act or consummated some transaction in this state; (2) the cause of action must arise from, or be connected with, such act or transaction; and (3) the exercise of jurisdiction must not offend traditional notions of fair play and substantial justice. *Shute v. Carnival Cruise Lines*, 113 Wn.2d 763, 767, 783 P.2d 78 (1989); *see also Grange Ins. Ass'n v. State*, 110 Wn.2d 752, 758, 757 P.2d 933 (1988) (referring to the state and similarly worded federal tests as "the due process test").

We will not find jurisdiction under the long-arm statute unless a nexus exists between the plaintiff's cause of action and the defendant's activities in the state. 14 Karl B. Tegland, *Washington Practice: Civil Procedure* § 4.13, at 71 (1st ed. 2003). Thus, the jurisdiction is specific; i.e., the court acquires jurisdiction to adjudicate a specific cause of action. 14

Washington Practice at 71. “Long-arm jurisdiction is always determined on a case-by-case basis, based upon the specific parties and the specific facts.” 14 Washington Practice at 71.

a. Purposeful Act

To establish the requisite minimal contacts that the first factor addresses, the evidence must show that IMG purposefully did some act or consummated some transaction in this state. The sufficiency of the contacts is determined by the quality and nature of the defendant’s activities, not the number of acts or mechanical standards. *CTVC of Hawaii, Co., Ltd. v. Shinawatra*, 82 Wn. App. 699, 710, 919 P.2d 1243 (1996).

[A state] does not acquire that jurisdiction by being the “center of gravity” of the controversy, or the most convenient location for litigation. The issue is personal jurisdiction, not choice of law. It is resolved . . . by considering the acts of the [defendant].

CTVC of Hawaii, 82 Wn. App. at 710 (quoting *Hanson v. Denckla*, 357 U.S. 235, 254, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958)). IMG’s activity level need not reach the level required to establish general jurisdiction. *See Raymond*, 104 Wn. App. at 637; *see also Quigley v. Spano Crane Sales & Serv., Inc.*, 70 Wn.2d 198, 202, 422 P.2d 512 (1967) (solitary business deal transacted within this state may vest jurisdiction in Washington courts under long-arm statute).

The mere execution of a contract with a state resident does not alone fulfill the “purposeful act” requirement. *MBM Fisheries*, 60 Wn. App. at 423. We must examine the entire transaction, including negotiations; contemplated future consequences; the terms of the contract; and the parties’ actual course of dealing. *Raymond*, 104 Wn. App. at 637; *MBM Fisheries*, 60 Wn. App. at 423. A party who does not initiate the business contact is not thereby immune from the personal jurisdiction of Washington courts if a business relationship subsequently arises. *Sorb*

Oil Corp. v. Batalla Corp., 32 Wn. App. 296, 299, 647 P.2d 514 (1982). Furthermore, personal jurisdiction is established if a transaction is initiated outside the state in contemplation that some phase of it will take place in the forum state. *Barer v. Goldberg*, 20 Wn. App. 472, 478, 582 P.2d 868 (1978) (citing *Griffiths & Sprague Stevedoring Co. v. Bayly, Martin & Fay, Inc.*, 71 Wn.2d 679, 684, 430 P.2d 600 (1967)); see *Van Steenwyck*, 834 F. Supp. at 342 (economic relationships created by contract were to have found their fulfillment outside Washington and specific personal jurisdiction was not established).

Although IMG insists that Schumacher's activities in Washington were strictly voluntary on his part and that the company never anticipated them, the contract provides that IMG would fly Schumacher from his residence in Washington to Utah on a weekly basis. This language appears to contemplate that some of Schumacher's work would take place in Washington. While acknowledging that Schumacher contacted Washington businesses in the course of his employment and performed some testing on IMG's behalf at Washington State University, IMG cites several federal cases stating that voluntary actions on an employee's part in the forum state are not sufficient to establish specific jurisdiction over an out-of-state employer. See, e.g., *Pennebacker v. Wayfarer Ketch Corp.*, 777 F. Supp. 1217, 1221 (E.D. Pa. 1991) (plaintiff's decisions to live in Pennsylvania and receive some paychecks there were unilateral decisions on his part that did not support specific jurisdiction in Pennsylvania over New York employer); *Romann*, 865 F. Supp. at 258, 263 (salesman's unilateral decision to work partly in home state of Pennsylvania did not establish specific jurisdiction over New Jersey employer where he had an office in New Jersey and employer neither required nor encouraged him to live or work in

Pennsylvania).

In contrast to these cases, Schumacher's contract with IMG anticipated that his activities in Washington would consist of more than residing here and collecting a paycheck. Furthermore, IMG was licensed to do business in Washington and apparently paid taxes in this state. *See Harbison v. Garden Valley Outfitters, Inc.*, 69 Wn. App. 590, 599, 849 P.2d 669 (1993) (minimum contacts analysis includes consideration of whether defendants invoked the benefits and protections of Washington laws).

IMG contends that the contract's choice of law provision is relevant here. The United States Supreme Court has stated that while a choice of law provision should not be ignored in considering whether a defendant has purposefully invoked the benefits and protections of a state's law for jurisdictional purposes, such a provision does not alone confer jurisdiction. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 482, 105 S. Ct. 2174, 85 L. Ed. 2d 528, 53 USCW 4541 (1985). Where the parties agreed that Florida law would govern a contract, the Sixth Circuit observed that there was much to be said in favor of letting contract disputes be resolved in Florida rather than Michigan, where the suit had been filed. *LAK, Inc. v. Deer Creek Enters.*, 885 F.2d 1293, 1295 (6th Cir. 1989). It went on, however, to address the contacts that the out-of-state partnership had with Michigan. *LAK*, 885 F.2d at 1300-03.

The contract here states that disputes are to be governed by Utah law and places primary, but not exclusive, jurisdiction in a Utah district court. Despite that provision, IMG contracted with a Washington resident, and its contract anticipated that some of the resident's work in establishing ongoing business relationships and developing new technologies and customers

would occur in Washington. Granted, IMG's contacts with Washington were not extensive. In *CTVC of Hawaii*, however, Division One found two purposeful acts—the defendant's funding of part of the plaintiff's operations in Washington and his use of a bank account in Washington—sufficient to address the next factor in the three-part specific jurisdiction test. *CTVC of Hawaii*, 82 Wn. App. at 718; *see also Roth v. Garcia Marquez*, 942 F.2d 617, 622 (9th Cir. 1991) (though neither side “decisively triumphs” on issue, there was enough purposeful availment to compel a finding of jurisdiction where the contract contemplated future activity in the forum state). Schumacher's actions on behalf of IMG in Washington were contemplated by and in fulfillment of his contract, and they satisfy the “purposeful act” factor of the specific jurisdiction test.

b. Cause of Action Arising from Contract

Washington courts apply the “but for” test to determine whether a claim against a nonresident company arises from, or is connected with, its solicitation of business within the state. *Raymond*, 104 Wn. App. at 640. Jurisdiction is proper in Washington if the events giving rise to the claim would not have occurred “but for” the corporation's solicitation of business within this state. *CTVC of Hawaii*, 82 Wn. App. at 719. This test preserves the requirement that there must be some nexus between the cause of action and the defendant's activities in the forum. *Raymond*, 104 Wn. App. at 640.

Schumacher's complaint against IMG alleges that the corporation failed to obtain a licensing and development agreement as the contract requires; failed to pay the fringe benefits, bonuses, expenses, and costs the contract required; and presented him with a new agreement that

demanded the assignment of patent rights without compensation. He asserts that these claims relate to IMG's failure to honor its promises concerning his employment as set forth in the contract. IMG responds that any lack of performance under the contract could not have occurred in Washington because the company had no activities here. We conclude that the contract dispute at issue arises from IMG's contacts in this state, thus satisfying the "but for" test.

c. Traditional Notions of Fair Play and Substantial Justice

In determining whether the assumption of jurisdiction by the forum state would offend traditional notions of fair play and substantial justice, courts consider the quality, nature, and extent of the activity in the forum state; the relative convenience of the parties; the benefits and protection of the laws of the forum state afforded the respective parties; and the basic equities of the situation.² *Grange*, 110 Wn.2d at 758.

In assessing the defendant's activity within Washington, we found it immaterial that the defendant had no office in Washington, that no agent of the defendant's had ever entered the state, and that each party to the contract remained in its home state and negotiated the contract via telephone and facsimile machine. *Precision Lab. Plastics*, 96 Wn. App. at 728-29; *see Peterson v. Kennedy*, 771 F.2d 1244, 1262 (9th Cir. 1985) (use of mails or telephone ordinarily

² The federal version of the "fair play and substantial justice" factor is that the exercise of jurisdiction in the forum state must be reasonable. *Zepeda v. Pace Int'l Research, Inc.*, 670 F. Supp. 1509, 1511 (W.D. Wash. 1987). The Ninth Circuit examines seven additional factors in determining reasonableness: extent of the defendant's purposeful interjection into the forum; burden on the defendant of defending in the forum; extent of conflict with the sovereignty of the defendant's state; the forum state's interest in adjudicating the dispute; the most efficient judicial resolution of the controversy; the importance of the forum to the plaintiff's interest in convenient and effective relief; and the existence of an alternative form. *Zepeda*, 670 F. Supp. at 1511. Although the parties cite this test, they do not argue that the state test does not comport with due process. We therefore apply only the state test, as outlined above. *See Grange*, 110 Wn.2d at 758.

does not qualify as purposeful activity invoking the benefits and protections of forum state). Far more important were the defendant's activities that created an ongoing business relationship encompassing continuing obligations with a Washington business, and the defendant's soliciting of the Washington business to produce a new product for it alone. *Precision Lab. Plastics*, 96 Wn. App. at 729. "Considering prior negotiations, contemplated future consequences, the terms of the contract, and the actual course of dealing, [the defendant] did more than merely enter into a contract with a Washington resident." *Precision Lab. Plastics*, 96 Wn. App. at 729. By contrast, the two contacts described in *CTVC of Hawaii* weighed against exercising specific jurisdiction over the nonresident defendants. *CTVC of Hawaii*, 82 Wn. App. at 720.

The extent of IMG's activity in Washington falls between the activity described in *Precision Laboratory Plastics* and *CTVC of Hawaii*. IMG contracted with a Washington resident who, as IMG's agent, set up an office and apparently registered IMG as a business in this state. The purpose of the contract was not to buy and sell goods, but to develop technologies and business relationships, neither of which is easily quantifiable. The contract contemplated that Schumacher would perform at least some of his IMG work in Washington, and the facts show that he did so. The quality, nature, and extent of IMG's activity in Washington supports the exercise of specific jurisdiction.

The second consideration under the "fair play and substantial justice" factor is the relative convenience of the parties. Both parties are subject to inconvenience if one is required to travel to the other's home state. See *Precision Lab. Plastics*, 96 Wn. App. at 729. With regard to whether Washington law affords the parties any special benefits or protections, the protection of

legal rights of Washington residents is a legitimate state interest. *Precision Lab. Plastics*, 96 Wn. App. at 730 (quoting *Sorb Oil Corp.*, 32 Wn. App. at 301).

In considering the basic equities of the case, the Ninth Circuit has observed that the law of personal jurisdiction is “asymmetrical,” with the primary concern being the defendant’s burden. *Fed. Deposit Ins. Corp. v. British-Am. Ins. Co., Ltd.*, 828 F.2d 1439, 1444 (9th Cir. 1987). Where the defendant has done little to reach out to the forum state, the burden of defending itself in a foreign forum militates against exercising jurisdiction. *Fed. Deposit Ins. Corp.*, 828 F.2d at 1444. Here, IMG contracted with Schumacher to become its employee and knew that he was performing some of his duties in Washington, and it was registered as a Washington business that paid taxes in this state. Schumacher bought goods from Washington companies on IMG’s behalf, communicated with other Washington businesses in an attempt to satisfy the terms of his employment, and did testing on IMG’s behalf at a Washington university. Traditional notions of fair play and substantial justice are not offended by this state’s assertion of specific personal jurisdiction over IMG.

II. Forum Non Conveniens

Courts generally do not interfere with the plaintiff’s choice of forum where jurisdiction is properly asserted. *Sales v. Weyerhaeuser Co.*, 163 Wn.2d 14, 19, 177 P.3d 1122 (2008). The doctrine of forum non conveniens grants a court the discretionary power to decline a proper assertion of its jurisdiction, however, when the convenience of the parties and the ends of justice would be better served if the action were brought and tried in another forum. *Johnson v. Spider Staging Corp.*, 87 Wn.2d 577, 579, 555 P.2d 997 (1976).

We need not examine the factors relevant to a forum non conveniens dismissal because Schumacher conceded during oral argument that the trial court properly dismissed his action on this basis. IMG has filed suit against Schumacher and two other former employees in Utah, and Schumacher has appeared in that case and consented to the jurisdiction of the Utah court. A trial concerning the same contract in Washington would be somewhat duplicative; Schumacher can assert his contract claims in the Utah action.

III. Attorney Fees

The long-arm statute authorizes an award of “a reasonable amount to be fixed by the court as attorneys’ fees” to a prevailing defendant. RCW 4.28.185(5). Given our conclusion that the trial court had specific jurisdiction over IMG, which renders IMG a losing defendant under the long-arm statute, we reverse the award of attorney fees to IMG under RCW 4.28.185(5).

We reverse the trial court’s decision that it lacked specific jurisdiction over IMG and we reverse the award of attorney fees to IMG.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Armstrong, J.

We concur:

Hunt, J.

Van Deren, C.J.

No. 37721-7-II